Milford Manor Nursing & Rehabilitation Center *and* SEIU 1199 New Jersey Health Care Union.[1] Case 22–CA–26745

December 13, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On August 18, 2005, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Milford Manor Nursing and Rehabilitation Center, West Milford, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. December 13, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] We have amended the caption to reflect the disaffiliation of the Service Employees International Union from the AFL–CIO effective July 25, 2005.

[2] In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) of the Act by failing to furnish all of the information requested in the Union's letter dated July 23, 2004, we note that the record supports the judge's finding that, at the time the charge was filed on January 18, 2005, the Respondent had not provided the information requested by the Union. Thus, there was an 8(a)(5) violation. To the extent some information may have been supplied later, these matters can be addressed in compliance proceedings.

Robert Gonzalez, Esq., for the General Counsel.

David Jasinski, Esq. and *Peter Dugan, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Newark, New Jersey on June 7 and 17, 2005. Upon a charge filed on January 18, 2005, a complaint was issued on March 31, 2005 alleging that Milford Manor Nursing & Rehabilitation Center (Respondent or Milford Manor) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practice.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by the parties on July 29, 2005.

On the entire record of the case, including my observation of the demeanor[1] of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New Jersey corporation, with an office and place of business in West Milford, New Jersey, has been engaged in the operation of a nursing home providing inpatient medical care. It has been admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted and I find that SEIU 1199 New Jersey Health Care Union, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. The Facts

Since March 1989 the Union and Respondent have been parties to successive collective-bargaining agreements (CBA), the most recent of which expired on March 31, 2005. The CBA includes a memorandum of agreement (MOA) executed by the parties on December 14, 2002 which provides that Respondent "may increase the percentage of Agency employees to no more than 40%."

On January 7, 2004[2] the Union filed a grievance alleging that Respondent violated the CBA by employing temporary agency workers in excess of the 40 percent permitted by the MOA.

By letter dated May 11 the Union requested information from Respondent including a list of each occasion that Respondent used agency personnel, the total number of hours paid to bargaining unit employees, the reasons why bargaining unit personnel were not used and the name of each agency used, together with the amounts paid to the agencies. On May 27

[1] Credibility resolutions have been based on the witnesses' demeanor, the weight of respective evidence, established or admitted facts, inherent probabilities, and inferences drawn from the record as a whole.

[2] All dates refer to 2004 unless otherwise specified.

Milford Manor responded to the letter by supplying some of the information requested.

After the May 27 response, Larry Alcoff, a union representative, spoke with counsel for Respondent, David Jasinksi. Alcoff told Jasinski that the information supplied was "not responsive." On June 28 Jasinski sent Alcoff a list of agency personnel who were used at Milford Manor. There were further telephone conversations during which Alcoff told Jasinksi that the information supplied was insufficient. Jasinski replied that the May 11 request constituted a "fishing expedition," to which Alcoff said that he would redraft the request "tailored" to the specific information that was needed. On July 23 the Union sent a new information request to respondent.

The arbitration commenced on October 13. Helen Wrobel, counsel for the Union, asked for the balance of the information requested. Respondent's position was that "they did not have the documents that we had requested. They had provided us with whatever they had . . . they did not have additional information . . . It was not kept by them. It was agency records." The Arbitrator ruled that Respondent had 30 days to provide the additional information to the Union.

On November 23 Ms. Wrobel wrote to Arbitrator Restaino pointing out that Respondent still had not supplied all of the information requested. A second day of hearing was then scheduled for January 31, 2005. At the arbitration hearing held on January 31 Respondent furnished additional information. Jasinksi stated that "they do not have access to all of the documents." The Arbitrator ruled that Respondent was to make available its books and records "for the Union to conduct an audit." The Union never conducted the audit, claiming that it did not have an auditor available to conduct the examination.

B. Conclusions

As part of its duty to bargain in good faith, an employer must comply with a union's request for information, including information relevant to the processing of grievances.

Stevens International, 337 NLRB 143, 150 (2001). I find that the information requested by the Union in its letter of July 23 was necessary and relevant for the Union to perform its duties as exclusive bargaining representative of its unit employees. See *Lenox Hill Hospital*, 327 NLRB 1065, 1068–1069 (1999).

Respondent contends that it produced all of the information that it had in its possession but could not produce the information which was in the agency's possession. A similar argument was made in *United Graphics*, 281 NLRB 463, 466 (1986), and was rejected by the Board.

The Board stated (id.):

> We further find that the Respondent's other defense based on nonpossession of the requested information is without merit. The Respondent has stipulated that Personnel Pool provides it with the names of the temporary workers. As for the other information requested, there is no evidence that Respondent has requested Personnel Pool to provide it with the information that the Union has sought. The Respondent thus has failed to demonstrate that such information is unavailable.

As in *United Graphics*, Respondent has failed to demonstrate that the information that it did not supply is unavailable. Accordingly, I find that Respondent, by failing to supply all of the information requested by Respondent's letter of July 23 has violated Section 8(a)(5) and (1) of the Act.

III. MOTION TO DEFER TO ARBITRATION

In its brief, for the first time, Respondent argues that this matter should be deferred to arbitration, pursuant to *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Respondent did not assert this as an affirmative defense in its Answer. At no time during the hearing did Respondent assert this as a defense. Thus, General Counsel was never given the opportunity to litigate the matter or present any arguments as to whether this proceeding should be deferred to arbitration. Not only has this motion not been "fully litigated," it in fact has not been litigated at all. Accordingly, the motion to defer to arbitration is denied. See *Maintenance Service Corp.*, 275 NLRB 1422, 1425 (1985); *Union-Tribune Publishing Co.*, 307 NLRB 25 fn.2 (1992).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. At all material times the Union has been the exclusive collective-bargaining representative of the employees in the appropriate unit.
4. By failing to furnish all of the information requested in the Union's letter dated July 23, 2004, Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(5) and (1) of the Act.
5. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall order that Respondent, on request, furnish to the Union the information in its possession requested in the Union's letter dated July 23, 2004. I shall also order Respondent to make a reasonable effort to secure the other information requested in the letter, and, if that information remains unavailable, to explain or document the reasons for its unavailability.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[3]

ORDER

The Respondent, Milford Manor Nursing and Rehabilitation Center, West Milford, New Jersey, its officers, agents, successors, and assigns, shall

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Refusing to bargain in good faith with the Union by failing to furnish the information requested in the Union's letter dated July 23, 2004.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) On request, furnish to the Union the information in its possession requested in the Union's letter dated July 23, 2004.

(b) Make a reasonable effort to secure the other information requested in the Union's letter dated July 23, 2004, and, if that information remains unavailable, explain or document the reasons for its unavailability.

(c) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 23, 2004.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. , August 18, 2005.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with the Union by failing to furnish the information requested in the Union's letter dated July 23, 2004.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, furnish the Union the information which we have in our possession requested in the Union's letter dated July 23, 2004 and WE WILL make a reasonable effort to secure the other information, and if that information remains unavailable, we will explain or document the reasons for its unavailability.

MILFORD MANOR NURSING AND REHABILITATION CENTER